In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1468

SALVATORE VAVOLIZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals did not write an opinion. The opinion of the district court (Pet. App. 19–23) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1970 (Pet. App. 17–18). The petition for a writ of certiorari was filed on April 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

386-019—70

QUESTIONS PRESENTED

1. Whether, on his motion to vacate his sentence, petitioner was improperly deprived of an evidentiary hearing on his allegations that (1) his guilty plea was involuntary, (2) he had been pressured into making the plea by his counsel and (3) his counsel, who also represented two of petitioner's co-defendants, was faced with a conflict of interest.

2. Whether petitioner was denied his right to a speedy trial.

STATEMENT

Petitioner and three other defendants were charged in a 73-count indictment with making false statements to the Immigration and Naturalization Service in connection with applications for first preference immigration visas in violation of 18 U.S.C. 1001 and with conspiracy to commit this crime (26A; R. 1).[1] Originally petitioner and defendants Quartarolo and Birbano were represented by Mr. Fusco, who in turn retained Mr. Krieger to handle all pretrial motions (26A). On October 3, 1968 Mr. Fusco's motion to withdraw from the case on the ground of illness and substitute Mr. Krieger as trial counsel for the three defendants was granted with the consent of petitioner (26A). On October 7, 1968 Mr. Krieger advised his clients that, although he was representing all of them, they each had a right to separate counsel. Each defendant advised Mr. Krieger and the court that he wanted

[1] "A" refers to Appellant's Appendix, a copy of which we are lodging with the Clerk of this Court. "R." refers to the record on file before this Court.

Mr. Krieger to continue to represent him (34A–35A). In response to inquiry by the court, both Mr. Krieger and government counsel stated they were unaware of any conflict of interest arising from such joint representation (35A).

The trial began on October 9, 1968, in the United States District Court for the Southern District of New York before Judge Tenney and a jury (26A; R. 16). The first three days of testimony from government witnesses included an identification of petitioner by an eye-witness and an opportunity for his counsel to listen to a tape recording implicating petitioner in the conspiracy (26A–27A, 74A; R. 16–pp. 250–251). On October 12, petitioner consulted with Mr. Krieger at his home about the possibility of pleading guilty (13A).

On October 14, 1968, during the progress of the trial, petitioner and defendant Birbano moved to withdraw their pleas of not guilty and substitute pleas of guilty to Counts 1 (conspiracy) and 10 (a substantive count) of the indictment (39A–40A, 42A–51A). Both motions were granted after a *voir dire* examination pursuant to F. R. Crim. P. 11 revealed that such pleas were entered knowingly and voluntarily and based on the testimony elicited to date with respect to these two counts which satisfied the Court that these defendants were in fact guilty of the crimes charged (51A–55a). During the *voir dire,* petitioner stated that he had discussed the matter with his counsel, that he was guilty of committing the acts charged, that he was pleading guilty voluntarily and

with understanding of the nature of the charges, that no coercion or promises had been employed and that he knew the maximum sentence which could be imposed (51A–53A).

On October 22, 1968 a mistrial was declared as to the remaining two defendants when the jury was unable to reach a unanimous verdict (Docket Sheet C).

On February 7, 1969, the date of sentencing, Mr. Muchio was substituted as petitioner's counsel (58A). Based on a letter received by the court from petitioner, the court suggested that a motion to withdraw the guilty plea might be in order. He warned petitioner not to be influenced by the sentence previously imposed upon defendant Birbano (67A).[2] Despite the court's suggestion, no such motion was made, although petitioner told the court he had not been aware that he had violated the immigration law when he committed the acts charged (68A–69A, 73A–74A). Petitioner was then fined $7,500 on Count 1 and sentenced to imprisonment for one year on Count 10. The prison sentence was suspended and petitioner was placed on unsupervised probation for one year (74A–75A).

Thereafter petitioner filed a motion pursuant to 28 U.S.C. 2255 to set aside his plea of guilty and vacate his sentence on the grounds that the court had failed to comply with Rule 11, F.R. Crim. P., that his counsel was subject to a conflict of interest and that his plea was entered as a result of undue pressure from his

[2] Birbano had been sentenced to imprisonment for one year, which sentence was suspended, and was placed on unsupervised probation for one year. No fine was imposed (66A–67A).

counsel (Pet. App. 22). Judge Tenney denied the motion without a hearing, after consideration of affidavits filed by petitioner and the government. The court was of the opinion that the *voir dire* examination conducted pursuant to Rule 11, F.R. Crim P. showed that petitioner had voluntarily entered his plea of guilty and that there was a factual basis for the plea (Pet. App. 22). The court also found that petitioner's counsel was not subject to a conflict of interest arising from joint representation, that imposition of a larger fine than expected was no reason to set aside the conviction and that petitioner's assertions that he was pressured by counsel to plead guilty did not require a hearing, since they were negatived by petitioner's own prior declarations before the district court (Pet. App. 22–23). On appeal, the court of appeals affirmed the district court's denial of the motion to vacate sentence (Pet. App. 17–18).

ARGUMENT

1. The recent decisions of this Court in *Brady* v. *United States,* No. 270 and *McMann* v. *Richardson,* No. 153, decided May 4, 1970, make clear the validity of the ruling below. Contrary to petitioner's contention, the court's *voir dire* examination (51A–53A) fully complied with the requirements of this Court as set forth in *McCarthy* v. *United States,* 394 U.S. 459, and affirmatively established that petitioner voluntarily and knowingly entered his plea of guilty.[3]

[3] In any event, *McCarthy* is not controlling, since it is not applicable to pleas (such as petitioner's) accepted prior to the date of its decision (April 2, 1969). See *Halliday* v. *United States,* 394 U.S. 831.

This careful examination disclosed that petitioner understood the charges against him, had conferred with counsel with respect to these charges and had not been threatened or coerced into pleading guilty. It further showed that petitioner had not been promised anything if he pleaded guilty and that he understood the maximum sentence which could be imposed (51A-53A). In addition, the court had satisfied itself from testimony heard in the first three days of trial that a factual basis existed for the plea of guilty (53A).

The record discloses that Mr. Krieger agreed to represent petitioner and his two co-defendants only after securing the individual consents of the three. Both Mr. Krieger and government counsel informed the court that they were unaware of any conflict of interest arising from such joint representation (34A-35A). It was permissible for the trial court to accept such representations of competent counsel denying a conflict of interest in the absence of unusual circumstances not shown here. *United States* v. *Armone*, 363 F. 2d 385, 405–406 (C.A. 2), certiorari denied, 385 U.S. 957.

Because all of petitioner's claims raised in his 2255 motion were fully aired before the trial court, it was unnecessary for the district judge hearing the motion, who was the same judge who presided at the trial, to hold an evidentiary hearing.

2. Petitioner at the time of his trial did not raise the contention that he was denied his Sixth Amendment right to a speedy trial (Pet. 13–16), but asserted

it for the first time on appeal to the court below. The claim is foreclosed by the petitioner's guilty plea.

In any event, the right to a speedy trial depends upon the circumstances of the particular case, *United States* v. *Ewell,* 383 U.S. 116, and was not denied here. Petitioner's counsel filed numerous pre-trial motions, the disposition of which was necessarily time-consuming (Docket Sheet B). Since petitioner neither moved for an immediate trial nor opposed any adjournment, his present claim, even if not foreclosed by his guilty plea, comes too late. See *United States* v. *Haller,* 333 F. 2d 827, 828 (C.A. 2), certiorari denied, 379 U.S. 921; *United States* v. *Lustman,* 258 F. 2d 475 (C.A. 2), certiorari denied, 358 U.S. 880; *Harlow* v. *United States,* 301 F. 2d 361, 367 (C.A. 5), certiorari denied, 371 U.S. 814.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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